

**Kristin Alexander**

**From:** Kristin Alexander  
**Sent:** Tuesday, December 12, 2006 11:47 AM  
**To:** Planning Board  
**Subject:** FW: Acton/GenPIBd: Notifying an Abutter about Entering Land  
**Importance:** High

Hi Planning Board:

This is regarding the Spring Farm Circle Definitive Subdivision Plan application before you tonight. In you packet is a letter from an abutter to the project, Mr. Hughes. He asked the Planning Board to deny the Spring Farm Circle subdivision because he says the applicant's survey/engineering firm entered his property illegally to obtain wetlands information for the project.

Greg asked me to get an opinion from Town Counsel on this issue. At the very bottom of this e-mail exchange is my request to Town Counsel. His response is directly below.

To sum up Town Counsel's answer – the issue Mr. Hughes' raised is not grounds to deny a definitive subdivision application.

Hope you find this information useful. Take care.

Kristin

-----Original Message-----

**From:** Stephen Anderson  
**Sent:** Monday, December 11, 2006 10:10 PM  
**To:** Kristin Alexander  
**Cc:** Roland Bartl; Don Johnson; John Murray  
**Subject:** RE: Acton/GenPIBd: Notifying an Abutter about Entering Land

Dear Kristen:

You have indicated that an applicant's surveying firm did not notify an abutting owner before entering that owner's property to flag wetlands and to survey and draw the boundary of those wetlands on the proposed definitive subdivision plan. You have asked whether this omission is grounds to deny the application for approval of the definitive subdivision plan.

The answer is no. The Planning Board can rely on the surveyed plans in acting on the definitive subdivision plan. If the surveyor's conduct constitutes actionable trespass, the remedy is limited to a private action between the offended owner on the one hand and the surveyor and the applicant (as the party engaging the surveyor) on the other.

The basis for this response is as follows:

1. Surveyors enjoy the following privilege against trespass (G.L. c. 266, § 120C; emphasis added):

Whenever a land surveyor registered under chapter one hundred and twelve deems it reasonably necessary to enter upon adjoining lands to make surveys of any description included under "Practice of land surveying", as defined in section eighty-one D of said chapter one hundred and twelve, for any private person, excluding any public authority, public utility or railroad, **the land surveyor or his authorized agents or employees may, after reasonable notice, enter upon lands,** waters and premises, not including buildings, in

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the commonwealth, **within a reasonable distance from the property line of the land being surveyed, and such entry shall not be deemed a trespass.** Nothing in this act shall relieve a land surveyor of liability for damage caused by entry to adjoining property, by himself or his agents or employees.

2. Based on a Westlaw search, there are no reported decisions under § 120C specifying the manner or nature of the required "reasonable notice."

3. Even assuming no advance notice was given by the surveyor to the abutting owner, the surveyor's technical trespass may not be actionable. See *Sprott v. Porrazzo* 2006 WL 2859389, \*7 (Mass.Land Ct.,2006) where the court found that there was "no actionable trespass" even though an owner had hired an engineer to survey the Disputed Area and install markers to indicate the boundaries of White Avenue; entered onto the Disputed Area with others; dug a large hole; and installed a granite boundary marker at the location of the historic center line of the original White Avenue. Since this activity was "for the purpose of setting the record boundary of White Avenue," under the circumstances, "this court finds that there was no actionable trespass."

4. Even if the surveyor's trespass was not privileged and is actionable, the trespassing surveyor would only be "liable for the harm which directly flows from his trespass." J. Nolan and L. Sartorio, Tort Law § 4.3 (2005) and cases cited therein. Thus, the remedy for trespass in Massachusetts typically can include either (a) injunctive relief against further trespass or (b) damages under each of the three alternative theories: reduction in fair market value, loss in enjoyment of use, and cost of restoration. See *Silva v. Melville*, 12 Mass. L. Rptr. 611 (Mass.Super.2001) (Gants, J.). If there is "damage to real property [that] is not permanent, the measure of recovery is the reasonable expense of repairing the injury plus the intervening loss of rental value for the period reasonably needed to repair the injury." *Fortier v. Town of Essex*, 52 Mass.App.Ct. 263, 265 (2001) (citations omitted). In extraordinary cases of "wilfull trespass, or one characterized by gross carelessness and want of ordinary attention" damages for emotional distress are recoverable, *Meagher v. Driscoll*, 99 Mass. 281, 285 (1868), along with treble damages, *Smith v. City of Marlborough* 2006 WL 2371969, \*4 (Mass.App.Ct.,2006).

5. What is missing in the present case is any suggestion that the abutter's land was damaged in any way by virtue of the surveyor's entry. In addition, there is no reasonable basis to believe that an injunction would issue against further entry by the surveyor, upon reasonable notice provided under § 120C.

6. In these circumstances, the violation of § 120C – if there was one - was temporary and ephemeral, harmless error, and curable by reasonable notice and re-entry.

7. Under these circumstances there is no basis for the Board to deny the definitive subdivision plan application based on the alleged violation of § 120C. See G.L. c. 41, § 81U ("In the event of disapproval, the planning board shall state in detail wherein the plan does not conform to the rules and regulations of the planning board or the recommendations of the health board or officer and shall revoke its disapproval and approve a plan which, as amended conforms to such rules and regulations or recommendations.").

If you have any questions, please let me know.

Steve

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Stephen D. Anderson  
ANDERSON & KREIGER LLP  
43 Thorndike Street  
Cambridge MA 02141-1764  
Phone: 617-252-6575  
Mobile: 617-510-1159

12/12/2006

Fax: 617-374-7506

e-mail: [sanderson@andersonkreiger.com](mailto:sanderson@andersonkreiger.com)

[www.andersonkreiger.com](http://www.andersonkreiger.com)

Anderson & Kreiger LLP will be moving on December 29 to new offices. My new contact information will be:

One Canal Park, Suite 200  
Cambridge MA 02141

Direct Dial: 617-621-6510

Direct Fax: 617-621-6610

Main number: 617-621-6500

Main Fax: 617-621-6501

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**From:** Kristin Alexander [<mailto:kalexander@acton-ma.gov>]

**Sent:** Monday, December 11, 2006 1:02 PM

**To:** Stephen D. Anderson

**Subject:** Notifying an Abutter about Entering Land

**Importance:** High

Good afternoon, Steve:

A neighbor to a definitive subdivision application is asking the Planning Board to deny a definitive subdivision application before the Board. The reason is – the applicant's surveying firm did not notify the neighbor before they entered the neighbor's property to identify/flag wetlands in the field (to draw on the definitive plan). The neighbor is quoting "Massachusetts General Laws – Crimes Against Property – Chapter 266, Section 120C" which discusses entering the property "after reasonable notice" to the property owner. The neighbor writes in a letter:

*"The Planning Application contains information that was not gathered in accordance with Massachusetts General Law. Having been obtained illegally, such information can not be considered in the due process of administering the Application....I respectfully reiterate that the application be rejected..."*

Staff doesn't believe potentially improperly notifying a neighbor about entering their property to do surveying work would be a reason to deny a subdivision application. We believe it's more of a private property owners / personal / civil issue.

The Planning Board Chairman has asked for case law that shows improper notification does not mean a subdivision application has to be denied. Could you provide the Planning Department with a brief opinion on the matter? If you have some case law re: the situation at your finger tips that you can forward to us or refer to, we would appreciate you sending it along – but it's not necessary. Unfortunately, we need this information by 7:00 PM tomorrow, Tuesday, 12/12/06.

Thank you for your help.

Kristin

12/12/2006

Kristin Alexander, AICP  
Assistant Town Planner  
Acton Planning Department  
472 Main Street  
Acton, MA 01720  
Phone: (978) 264-9636  
Fax: (978) 264-9630  
e-mail: [kalexander@acton-ma.gov](mailto:kalexander@acton-ma.gov)

M.G.L.A. 266 § 120C


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Effective: [See Text Amendments]

Massachusetts General Laws Annotated Currentness

Part IV. Crimes, Punishments and Proceedings in Criminal Cases(Ch. 263-280)

Title I. Crimes and Punishments (Ch. 263-274)

 Chapter 266. Crimes Against Property (Refs & Annos)

→ § 120C. Entry upon adjoining lands by surveyors not constituting trespass

Whenever a land surveyor registered under chapter one hundred and twelve deems it reasonably necessary to enter upon adjoining lands to make surveys of any description included under "Practice of land surveying", as defined in section eighty-one D of said chapter one hundred and twelve, for any private person, excluding any public authority, public utility or railroad, the land surveyor or his authorized agents or employees may, after reasonable notice, enter upon lands, waters and premises, not including buildings, in the commonwealth, within a reasonable distance from the property line of the land being surveyed, and such entry shall not be deemed a trespass. Nothing in this act shall relieve a land surveyor of liability for damage caused by entry to adjoining property, by himself or his agents or employees.

CREDIT(S)

Added by St.1972, c. 158.

HISTORICAL AND STATUTORY NOTES

2000 Main Volume

St.1972, c. 158, was approved April 13, 1972.

LIBRARY REFERENCES

2000 Main Volume

Trespass  24.  
Westlaw Topic No. 386.

C.J.S. Trespass § § 52 to 55, 133.

RESEARCH REFERENCES

2006 Main Volume

**Treatises and Practice Aids**

32 Mass. Prac. Series § 410, Criminal Trespass.

37 Mass. Prac. Series § 4.1, Trespass to Real Property-Elements.

37 Mass. Prac. Series § 10.4, Privileges as to Real and Personal Property.

M.G.L.A. 266 § 120C

14A Mass. Prac. Series § 9.275, Trespass.

14C Mass. Prac. Series § 20.62, License as Privilege.

17A Mass. Prac. Series § 32.12, License or Consent.

M.G.L.A. 266 § 120C, **MA ST 266 § 120C**

Current through Ch. 340, except for c. 324, 327, 333 and 336  
of the 2006 Second Regular Session.

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